STATEMENT
OF
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DEPARTMENT OF JUSTICE

BEFORE THE
HOUSE SUBCOMMITTEE ON IMMIGRATION AND CLAIMS
COMMITTEE ON THE JUDICIARY

ON
A HEARING
REGARDING
HR 1745
HR 238
AND
HR 945

TUESDAY, MAY 18, 1999
2226 RAYBURN HOUSE OFFICE BUILDING
10:00AM

Mr. Chairman and Members of the Subcommittee, my name is Bo Cooper and I am the

Acting General Counsel for the Immigration and Naturalization Service (INS). Thank you for the opportunity to appear before you today to discuss proposals to amend our immigration laws. We appreciate the Subcommittee's interest in the views of the Immigration and Naturalization Service, Department of Justice.

You have requested our views of the following legislation:

H.R. 1745, introduced by Congressman Andrews. The bill would amend the Immigration and Nationality Act (INA) to provide for the deportation of aliens who associate with known terrorists;

H.R. 238, introduced by Congressman Rogan. This bill would amend section 274 of the INA to impose mandatory minimum sentences, and increase certain sentences, for bringing in and harboring certain aliens. It would also amend title 18, United States Code, to provide enhanced penalties for persons committing such offenses while armed; and

H.R. 945, introduced by Congressman Underwood. The bill would prevent aliens from applying for asylum in Guam. It would require aliens in Guam seeking asylum to be arrested, detained, and transported to another place for processing under the Act.

H.R. 1745: Deportation of Aliens Who Associate with Known Terrorists

H.R. 1745 would add a new subparagraph to section 237(a)(4)(B) of the INA, which provides for the removal from the United States of lawfully-admitted aliens who engage in terrorist activity. H.R. 1745 would expand this section to provide a ground of removal for associating with an individual whom the alien knows, or has reasonable ground to believe, is a terrorist.

As you are aware, the INS has an enormously complicated task in admitting those who deserve our welcome and removing those who do not. The most compelling governmental interest is the protection of the national security. Congress has set forth this principle in the immigration procedures by enacting legislation precluding the entry to, and facilitating the removal from, the United States of individuals who may pose a threat to the national security. To this end, Congress has expanded the INS' counterterrorism authority through such legislation as the Immigration Act of 1990 (IMMACT 90), the Antiterrorism and Effective Death Penalty Act (AEDPA), and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). These laws have enhanced the INS' authority to exclude, arrest, and deport aliens involved in a variety of terrorist activities, and have provided for specific criminal and administrative removal provisions directly concerning alien terrorists and their supporters. Taken as a whole, these tools clarify Congress' expectation that the INS must play a larger and increasingly critical role in counterterrorism activities.

While DOJ endorses any legislation that facilitates its efforts to identify and counterattack

the efforts of terrorist organizations and those who support them, we must be vigilant to ensure that such legislation will be effective in practice and will withstand judicial review. DOJ has identified specific problems with H.R. 1745 that would prevent it from being effective.

The proposed statutory provision is problematic in that it refers to individual terrorists who are designated as terrorists in the Department of State publication "Patterns of Global Terrorism." This raises two issues. First, the number of individual terrorists who are referred to by name in this publication is so small that the provision will have little effect. Second, the term "designated" is now a term of art used in section 219 of the INA, and refers to a process whereby the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, formally designates foreign terrorist organizations. There is no such process for designating individual terrorists. Use of this term, therefore, is confusing and, if interpreted literally, means that because no named individual terrorists have been "designated," no such terrorists exist, and the provision is meaningless.

The bill appears to be aimed at conduct which aids and abets terrorists. However, the second sentence in the proposed 237(a)(4)(B)(ii) (referring to aiding and abetting) could be interpreted as illustrative rather than as an exhaustive definition of association. The bill could then be viewed as creating a deportation ground based on pure association. This would raise serious First Amendment concerns in light of the Supreme Court's long-standing First Amendment decisions governing deportation based on aliens' associational activities with foreign subversive groups. (See, e.g., Galvan v. Press, 347 U.S. 522, 528 (1954); Rowoldt v. Perfetto,

355 U.S. 115 (1957)). Those decisions make clear that association that is not "meaningful" is not constitutionally sufficient for deportation, but that where there is meaningful association that can be identified and articulated, then deportation based on that type of association is justified. The bill would be clearer if it specified that association occurs only where the aiding and abetting standard is met.

Moreover, while some specification of what types of association with known terrorists can be the basis for deportation is constitutionally necessary, the specification in the current bill -- which makes “aiding and abetting” an individual to engage in terrorist activity a deportable offense -- raises policy concerns. In the civil context, the legal term “aiding and abetting" has been interpreted by courts to require, among other things, a specific intent to knowingly and substantially assist the principal violation. See, e.g. Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983). A requirement that the government must prove specific intent to “knowingly and substantially assist” in terrorist activity runs counter to the Department’s view that deportation offenses generally do not require specific intent. Additionally, courts have declared that in order to establish a common law cause of action for aiding and abetting, a plaintiff must at least demonstrate some measure of active participation and the knowing provision of substantial assistance to the principal's actions (which in this case would be engaging in terrorist activity). See, e.g. Schultz v. Rhode Island Hosp. Trust Nat'l Bank, 94 F.3d 721, 730 (1st Cir. 1996). If aiding and abetting were interpreted as the knowing provision of substantial assistance, then

section 237(a)(4)(B) of the INA appears to already cover the conduct which this bill addresses, by reference to section 212(a)(3)(B)(iii). Section 212(a)(3)(B)(iii) defines "engage in terrorist activity" to include the knowing provision of material support to an individual terrorist or a terrorist organization.

Further, the proposal creates a standard of proof of "reasonable suspicion" for proving a deportable act. This will be difficult to reconcile with the regulatory standard for deportable offenses requiring “clear and convincing” evidence. As written, the bill will require that the INS prove by clear and convincing evidence that there is reasonable suspicion that the alien aided and abetted another individual to engage in terrorist activity. The resulting confusion will cause problems in litigation.

In addition, the Subcommittee should note that the amendment makes a minor, and perhaps inadvertent, amendment to section 237(a)(4)(B) of the INA, as that section currently reads. In the proposed language, the adjective "any" is omitted from the phrase "any terrorist activity." The INS is concerned that aliens opposing removal under this ground may assert that the omission of this adjective reflects Congress' intent that the provision only apply to the most serious of terrorist activities, such as the recent bombings of the U.S. embassies in Africa, and not lesser terrorist activities.

Finally, the Subcommittee should be aware that the Department is currently preparing antiterrorism legislation which will, among other things, clarify and improve section 212(a)(3)(B) of the INA (the subsection that defines the terms "terrorist activity" and "engage in terrorist activity"). This legislation is undergoing review within the Department, but we anticipate that it will strengthen the provision in 212(a)(3)(B)(iii) regarding the provision of material support to an individual or a terrorist organization. At the same time, this area involves difficult questions of First Amendment rights that need to be carefully evaluated in light of the government's interest in controlling immigration. The Department's proposal will address these concerns. Given the specific problems with H.R. 1745 outlined above, we recommend that the Subcommittee defer consideration of this bill until it reviews the Department's proposal.

H.R. 238: Enhanced Sentences for Alien Smugglers

H.R. 238, introduced by Congressman Rogan, would increase the penalties for alien smuggling contained in section 274 of the Immigration and Nationality Act. The bill would impose mandatory minimum sentences, increase certain maximum sentences, and impose enhanced penalties for repeat offenders. In addition, the bill would amend title 18 of the United States Code to provide a new offense, with mandatory minimum sentences, for committing certain smuggling offenses while armed.

While the INS generally supports a need to increase sentences for alien smuggling offenses, it does not support H.R. 238 as presently drafted. In our view, the proposed amendments to INA section 274(a)(1)(B) are overly broad and inappropriate. Rather than creating additional statutory mandatory minimums for all alien smuggling offenses, we suggest an increase in sentences under the sentencing guidelines or a legislative directive to the U.S. Sentencing Commission to revise their existing sentencing guidelines to increase sentences for alien smuggling offenses. This approach is preferred over rigid mandatory minimums since the guidelines can better distinguish between aggravating and mitigating circumstances. For example, the guidelines can better account for situations where a mandatory minimum may not be appropriate, such as where a person is smuggling close family members, as opposed to situations where the smuggling is for the purpose of commercial gain.

We recognize that INA section 274(a)(2) already provides mandatory minimum sentences for certain offenses. However, the mandatory minimum sentences in that provision are limited to aggravated offenses--those involving intent or reason to believe that the alien brought into the United States will commit a felony, and those done for commercial advantage or for private financial gain. If any new mandatory minimum sentences relating to alien smuggling are enacted, Congress should seek to harmonize the penalties in sections 274(a)(1) and (a)(2) in a manner that focuses on only aggravated smuggling offenses.

In addition, DOJ wishes to bring to the attention of the subcommittee the Supreme Court's recent decision in Jones v. United States, 119 S. Ct 1215 (Mar. 24, 1999). That decision suggests a possible constitutional impediment in criminal statutes that contain graduated penalty provisions. Essentially, the issue is whether, under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, a factor (other than a prior conviction) that increases the maximum penalty for an offense must be charged in the indictment and proven before a jury beyond a reasonable doubt. Although it is our view that the Constitution does not require that factors which increase the maximum statutory penalty be treated as an element of the offense, Congress may wish to structure any proposed aggravating factors as elements of the offense rather than penalty enhancements to avoid future litigation. If, however, Congress wishes to structure the proposed amendment strictly as a penalty enhancement, it should make its intention clear in this regard.

We also note that the proposed amendment removes the current language in section 274(a)(1)(B) which applies penalties for section 274(a)(1)(A) alien smuggling offenses to "each alien in respect to whom a violation occurs." However, section 274(a)(2) continues to make each alien the unit of prosecution for alien smuggling offenses defined in that subsection. This situation raises the question of whether the mandatory minimum three-year sentences imposed on a per alien basis for section 274(a)(2) violations should continue when done for commercial

advantage or private financial gain.

We believe the threat that armed smugglers pose to INS enforcement officers deserves the new offense, and accompanying penalty provisions, prescribed in section 2 of H.R. 238. The INS has become more successful in detecting, deterring and dismantling alien smuggling organizations with the help of recently acquired legislative authorities, including wire intercept, business proprietary and expanded asset forfeiture authority. However, while INS increases the pressure on alien smugglers, they are becoming more desperate, brazen and dangerous. Consequently, they are willing to use deadly force to an increased degree to accomplish their illegal objectives.

H.R. 945: Denying Aliens the Opportunity to Apply for Asylum in Guam

H.R. 945 would prohibit aliens from pursuing claims for asylum in Guam. It would require the INS to detain any alien in Guam who applies for admission to the United States by making a claim for asylum, and transport that alien to a location outside of Guam for further processing under the Immigration and Nationality Act. The bill requires that the alien be transported within 30 days from the date the alien is deemed an applicant for admission. Finally, the bill would require the Attorney General to enter into a contract with the Government of Guam to provide for full and complete compensation to Guam for any expense incurred by Guam with respect to the detention of any alien under the bill.

As a preliminary, general matter, the Administration is troubled by the bill's language that would purports to prohibit aliens from seeking asylum in a territory of the United States or after having been interdicted by, presumably, agents of the United States and being transported to the territory (Guam). Seeking asylum from bodily harm or denial of rights is a basic human right. Providing refuge in such situations reflects one of our important national values as well as commitments we have made internationally. It is a right that should apply in all areas under the sovereignty of the United States and in all cases involving employees of the United States. Finally, because granting refuge to people facing such threats reflects a basic policy of our government and our international commitments, prohibiting such application under the INA would not prohibit them from being sought -- or being granted under our moral and international commitments to human rights.

That having been said, while the INS supports the overall objectives of reducing alien smuggling into Guam and easing the burden on the Government and citizens of Guam resulting from the recent increase in alien smuggling, we believe the proposed bill is likely to undermine the Government's efforts to combat combating alien smuggling by encouraging smugglers to bring aliens to Guam as a means to reach the United States. In addition, we believe that a more effective approach to easing the burden on Guam is to deter alien smugglers through an enhanced interdiction program. Moreover, compliance with the

provisions of the bill would result in significant costs and diversion of funds that could more effectively be used for enhanced enforcement efforts and detention and processing of aliens in Guam.

In recent months, Guam has seen a sharp increase in the smuggling of aliens from the People's Republic of China. We believe that the goal of the smugglers is for the aliens to reach the United States where they can pursue their asylum claims, request release from an overburdened INS detention system, and work to pay off huge debts to the smugglers. The proposed bill is likely to assist the smugglers in achieving this goal by requiring transport to a place outside of Guam for further processing under the Immigration and Nationality Act, which only applies within the United States. The INS would be prohibited from conducting even a preliminary credible fear screening to remove, through expedited removal, aliens arriving on Guam with clearly frivolous claims for asylum. Instead, the INS would be required to transport from Guam all aliens who assert a fear of return. Aliens not subject to expedited removal who are placed in regular removal proceedings before an immigration judge in Guam could delay the removal process and obtain free transportation to the continental United States simply by asserting a claim for asylum. The immigration judge would have to transfer the proceedings to another venue where the alien could apply for asylum. Thus, the bill would delay the expeditious return of inadmissible aliens -- an effective deterrent to smuggling -- and would further the smugglers' ultimate goal of bringing aliens to

the United States, encouraging further smuggling into Guam.

We believe that a more appropriate response to the sharp increase in alien smuggling in the area of Guam is through a comprehensive strategy of interdiction and repatriation with appropriate protections for those who have a credible fear of persecution. Over the past month, the Coast Guard has successfully interdicted four vessels attempting to smuggle nearly 500 Chinese migrants into Guam. Those migrants have been diverted to the island of Tinian in the Commonwealth of the Northern Mariana Islands for processing and repatriation to the People's Republic of China. The INS is working with the Departments of State, Defense, and Justice, as well as the Coast Guard, to make this effort an effective response to the recent increase in smuggling activity. The Coast Guard is also stepping up its interdiction efforts with increased maritime patrols. It has supplemented its two permanent vessels in Guam with three additional vessels and a patrol aircraft detailed to the region for this purpose. These efforts and commitments are being undertaken in the wake of a surge in smuggling operations from China and Guam of unprecedented magnitude. They are not intended to be permanent, long-term measures, but are anticipated as short-term, interim measures pending effective resolution of the problem. We believe that the enhanced interdiction efforts, in particular, will provide an effective deterrent to the use of Guam as a point of illegal entry to the United States. We will continue to review the efficacy and efficiency of the current operations, and their impact on the local community, and will remain open to seriously considering additional

measures to address changing circumstances.

Additionally, the cost of transporting to another site every arriving alien who expresses a fear of return and every alien in Guam who wishes to apply for asylum would be far more expensive than reimbursing the Government of Guam for its share of the burden. Each planeload bringing aliens from Guam to the United States would cost approximately $300,000. The proposed legislation would force the INS to divert scarce resources that could more effectively be used for enforcement efforts, including detention and processing of aliens on Guam.

The INS agrees that Guam should not have to bear the financial burden incurred in detaining aliens smuggled to Guam. As recently explained in a May 4th letter from the INS to the Honorable Carl T.C. Gutierrez, Governor of Guam, the Department of Justice is committed to finding the necessary funding to reimburse the government of Guam for the costs incurred in detaining Chinese aliens on behalf of the INS and is working closely with the White House in that effort. In addition, the INS and the Executive Office for Immigration Review have deployed additional human resources, including asylum officers, immigration judges, and trial attorneys, to complete the administrative proceedings for those cases currently held in Guam's correctional system on behalf of the INS.

We believe that the efforts I have outlined above, including an enhanced interdiction program, a commitment to provide reimbursement to the government of Guam, and increased human resources to address the pending cases on Guam, are the most appropriate and effective response to the current problems experienced by Guam. The enhanced interdiction efforts, in particular, will provide an effective deterrent to the use of Guam as a point of illegal entry to the United States.

Again we appreciate the invitation by the subcommittee for the views of INS on these bills. I will be pleased to answer any questions.